Supreme Court, U. S.
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IN THE

SUPREME COURT

OF THE

UNITED STATES

79-1390

WANDA STARR WRIGHT, Individually and as Administratrix of the Estate of James Lewis Wright,

Plaintiff-Petitioner

vs.

SOUTHERN BELL TELEPHONE COMPANY,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION OF WANDA STARR WRIGHT

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IN THE

SUPREME COURT

OF THE

UNITED STATES

WANDA STARR WRIGHT, individually and as Administratrix of the Estate of James Lewis Wright,

Plaintiff-Petitioner

vs.

SOUTHERN BELL TELEPHONE COMPANY,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Wanda Starr Wright, prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on October 22, 1979.

I. OPINION OF COURT OF APPEALS

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 605 F.2d 156. A copy is appended to this Petition.

II. JURISDICTION OF THE UNITED STATES SUPREME COURT

This court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1254(1) to review the judgment of the United States Court of Appeals for the Fifth Circuit dated and entered October 22, 1979. Petitioner's motions for panel rehearing and for rehearing en banc were denied by order of the United States Court of Appeals for the Fifth Circuit dated January 3, 1980. On January 21, 1980 pursuant to Rule 41, Federal Rules of Appellate Procedure, and Fifth Circuit Local Rule 10(e) (13) the issuance of the mandate was stayed pending determination of the

relief requested in this Petition.

III. THE QUESTION PRESENTED FOR REVIEW

Was Georgia Law abrogated by the court of appeals in holding that Southern Bell was not liable for the death of a mobile home owner when the utility's servant directed the individual to go under the structure to assist her without a warning of the danger, known by the servant to be present?

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

NONE

V. STATEMENT OF THE CASE

James Wright was killed in May, 1975, when a mobile home fell, crushing his head. Jay was at home when Vivian Cox, an employee of Southern Bell, arrived to install three telephones purchased by the Wrights. The mobile home was not permanently underpinned. Southern Bell's policy is that no service person is to solicit assistance

from customers. Unaware of this directive and acting on a specific request from Mrs. Cox, Jay assisted by crawling under the trailer.

Jay crawled under the mobile home to pull a wire through a hole Cox had drilled in the kitchen floor. This method of installation was contrary to the Southern Bell Service Mannual which required that mobile home installations be done in such a way that crawling under the home would not be necessary. Jay was not familiar with the danger associated with his actions as was Cox who had installed telephones in mobile homes on prior occasions. Cox did not warn Jay Wright of the danger that the trailer could easily fall because of the work performed by Southern Bell's service person.

Wanda Starr Wright, individually and in her capacity as administratrix of the estate of her husband filed a complaint

in the United States District Court for the Southern District of Georgia against Southern Bell. Jurisdiction of the district court was based on the diverse citizenship of the parties, 28 U. S. C. A. Section 1332. The first trial of the case resulted in a mistrial on February 2, 1977. On February 17, 1977, the case was tried again before Anthony A. Alaimo, Judge for the Southern District of Georgia. A jury verdict was rendered in favor of Wanda Starr Wright for $65,000. Southern Bell's February 22, 1977, motion for judgment N.O.V. or, in the alternative, for a new trial was denied by the district court. Southern Bell appealed to the Fifth Circuit Court of Appeals. By order dated October 22, 1979, the district court's denial of Southern Bell's motion was reversed and judgment entered for Southern Bell.

VI. ARGUMENT FOR GRANTING WRIT

Supreme Court Rule 19 illustrates

the character of cases which will be considered for the issuance of a writ of certiorari. Subsection (1)(b) refers to a court of appeals decision on an important state question which was rendered in conflict with applicable state law. Petitioner would respectfully show that her request is of this nature and is not a frivolous motion to be denied without consideration.

Georgia agency and tort law was completely ignored in the opinion of the court of appeals. In all tort cases the initial question is whether the tortfeasor owed a duty to the injured party. Prior to the opinion by the court of appeals the law of Georgia regarding the duty of a tortfeasor in cases of this nature was established in the case of Higgins vs. D & F Electric Company, 110 Ga.App.709, 140 S.E.2d 99 (1964).

It is quite clear that in Georgia an ancillary consideration to the inquiry

of duty is one which classifies the person to whom the duty is allegedly owed. Reference to Headnotes Five and Six of Higgins make it obvious that a decision be made regarding the status of the person to whom the duty is owed. If he is a volunteer an extremely low duty of care is owed, i.e., not to willfully or wantonly injure him after discovering his peril. On the other hand, if the injured person has an interest in the subject matter he is not a volunteer and is owed a higher degree of care, i.e. duty to act reasonably and warn one of known hazards. The Higgins court went on to find that the plaintiff was not a volunteer and that the master should be liable for the servant's negligence. Higgins was dismissed by several hollow statements by the court of appeals.

Initially, there was an attempt to distinguish the cases on the facts.

Petitioner contends primarily that the facts are indistinguishable and secondly, that even if they are, the legal principle of Higgins remains the same. The court pitches the factual difference on knowledge. Petitioner need only mention that Southern Bell's employee had knowledge of the danger of crawling under a mobile home. By her request to Mr. Wright and failure to warn she created the exact situation that existed in the Higgins case.

Secondly, the opinion of the court of appeals attempts to discard Higgins on the ground that it was assumed that the employee was acting within the scope of his authority. The circuit court's opinion rests on the finding that Mrs. Cox was acting beyond her scope of authority as a matter of law. Scope of employment is nowhere assumed in Higgins, but a finding that Mr. Cash was within the scope of his employment is implicit

especially in consideration of the prior Georgia law completely discarded by the court of appeals. Mrs. Wright's Petition rests on this point of law. The court of appeals ruled as a matter of law that Cox was acting beyond the scope of her employment because she solicited assistance without express authority. Georgia law has never recognized this principle which is inherently incorrect because it negates the theories of implied or apparent authority in such situations. Here the Fifth Circuit erred. A well-defined body of Georgia law regarding scope of employment was ignored by the court of appeals hearing panel.

Scope of employment was considered in the cases of Porter vs. Jack's Cookie Co., 106 Ga.App. 497, 127 S.E.2d 313 (1962) and Evans vs. Caldwell, 52 Ga.App. 475, 184 S.E. 440 (1936), aff'd, 184 Ga. 203, 190 S.E. 582 (1937), both decided before Higgins, supra. In essence these cases

held that an act of a servant is within the scope of the servant's authority if it belongs to the class of services authorized by the master. In Porter this included a theory of liability against the master for injury to a helper whose aid was solicited in contravention of the master's orders. These cases constitute the law of Georgia on the issue of scope of employment. There must be a determination of whether the act is within the class of services authorized by the master. The jury as instructed by the district court made this determination in favor of the Petitioner. The court of appeals avoided this well-settled principle by applying, out of context, the case of Huddle House, Inc. vs. Burke, 133 Ga.App. 643, 211 S.E.2d 903 (1974).

Without question the decision in Huddle House turned on the fact that

there was notice to the injured party immediately before his injury that he was not to give assistance to the servants of the master. The Court cited the importance of this factor first in its Syllabus. In the text of the opinion it was stated that, "(t)his case is decidedly different from cases where one is injured not knowing the servant is violating instructions, as was the case in the example given in Summers vs. Barron, 59 Ga.App. 202, 210, 200 S.E. 228." As if the foregoing was not sufficient to limit the holding, as it obviously was not for the court of appeals, two members of the court in a special concurrence stated:

> The majority place great reliance on the fact that Mr. York, the manager, specifically instructed Burke, in the presence of the other employees, to stay out of the counter area where he was not permitted to go. Upon this the case hangs, and upon this I have concluded the majority is quite correct.

There is no more lucid way to state that notice of the servant's violation of his master's instructions is vital for the application of Huddle House in the opinion of the court of appeals.

Citing Huddle House as controlling authority the court of appeals held:

> In Huddle House, Inc. vs. Burke, 133 Ga.App. 643, 647, 211 S.E.2d 903, 907 (1974), the Georgia Court of Appeals held:
>
> No employee has power to employ another to assist him in his work without express authority; and if he does so, he is acting without the scope of his authority.

Petitioner would direct the attention of this Court to the text of the Huddle House case. One only needs to read the opinions cited in Huddle House to see that this statement inapplicable to the case at bar. Carter vs. Bishop, 209 Ga. 919, 76 S.E.2d 784; Cowart vs. Johnson, 75 Ga.App. 855, 44 S.E.2d 804; Waller

vs. Southern Ice & Coal Co., 144 Ga. 695, 87 S.E. 888; Atlanta & West Point Railroad Co. vs. West, 121 Ga. 641 (4), 40 S.E. 711. Each of these cases dealt with the liability of the master to a fourth person injured by the negligence of the third party assistant. This would be analagous to Southern Bell's liability for one injured by the negligence of Mr. Wright. In such an instance express authority may be required to extend the master-servant relationship making the master liable for the act of his sub-agent. In any event the principle of law on which the court of appeals based its decision is not applicable to the question being considered, e.g. the liability of the master for injury to the third party assistant, not liability of the injury caused by third party assistant, sub-agent.

A final attempt is made by the court of appeals to evade the application

of Higgins, supra, by stating that since the plaintiff's theory of recovery is couched in the doctrine of respondent superior the decedent's status as a "volunteer" is irrelevant. This is simply not true according to Georgia law. Mrs. Higgins brought her case under the same theory as does Mrs. Wright. She did not seek recovery for her husband's death because he was a servant of the electric company, yet the Court's opinion is replete with discussion of his status as a non-volunteer. The defendant in Higgins attempted to avoid liability by invoking the follow-servant rule. This was unsuccessful as is illustrated by 56 C.J.S. Master and Servant Section 328b, p.1091, as cited in the court's opinion.

Finally, the court of appeals attempts to cushion the impact of its decision upon the body of Georgia law.

A mere statement that the opinion is not at odds with Georgia law will have no effect on the future use of th s opinion. The court of appeals based it's decision on the fact that Ms. Cox was not acting within the scope of her authority when she asked Mr. Wright to crawl under a mobile home. In fact Georgia law requires that a jury consider whether or not this act was within the class of services authorized by Southern Bell. The trial judge charged this as the applicable law and the jury found that her request for assistance was within the authorized class of services and therefore, that she was within the scope of her employment when she solicited Mr. Wright's help. The applicable Georgia cases support the jury's findings. Unfortunately, the court of appeals rested its opinion on a quotation from a case not applicable to the question at bar. The quote itself

as evidenced by the cases cited dealt with a totally different realm of respondeat superior.

In conclusion, Petitioner is confident that she has more than adequately illustrated how the court of appeals' opinion is in conflict with well-established Georgia law. This is an important state question. Georgia law has been disregarded. Not only petitioner, but future litigants will feel the harsh results of the error made by the Fifth Circuit. According to their decision a master is never liable to an injured third party lending assistance to a negligent servant unless the servant has express authority to solicit assistance (even if there is overwhelming apparent or implied authority). A simple illustration should suffice.

The master instructs his servant to move a one-half ton box from a shelf, but does not expressly direct the servant

to solicit assistance. Of course, the master implies this by his direction that the three or four person task be performed. When the servant solicits the help of one person instead of a sufficient number of people to perform the task and does not warn the third person of the weight of the box it is obvious that one, if not both, will be injured. Using the reasoning of the Fifth Circuit the servant is not acting within the scope of his authority even though there was overwhelming evidence of implied authority to solicit assistance. This leaves service oriented businesses with a license to control their liability. There is no doubt that homeowners will continue to act on the implied and especially the apparent authority of servicemen. Little do they know that internal company policies not made known to them will prevent recovery if they

are injured when lending assistance. This is not the intent of Georgia law.

Petitioner contends that the opinion of the court of appeals is an example of a result-oriented approach which failed to consider well-established Georgia law and in doing so effectively revoked Petitioner's substantive right to have her case heard and decided by a jury of her peers.

WHEREFORE, Petitioner respectfully requests that this Honorable Court issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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February 16, 1980

APPENDIX

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WANDA STARR WRIGHT, Individually and as Administratrix of the Estate of James Lewis Wright, Plaintiff-Appellee,

v.

SOUTHERN BELL TELEPHONE COMPANY, Defendant-Appellant.

No. 77-2208.

UNITED STATES COURT OF APPEALS, Fifth Circuit.

Oct. 22, 1979.

Appeal from the United States District Court for the Southern District of Georgia.

Before SIMPSON, TJOFLAT and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

This appeal involves the tragic death of a homeowner who was killed when the temporary blocks supporting his mobile home gave way and the home collapsed upon him. Specifically, we are asked to decide whether the telephone company may be held liable for this

death, assuming that the homeowner was under the house at the request of the telephone company's employee. After careful consideration of this question, we reach the conclusion that there is no legal basis for recovery against the phone company. Accordingly, we reverse the judgment entered in favor of the plaintiff.

In May of 1975, Wanda and James Wright made arrangements to lease a mobile home from Southern Sales & Service, a mobile home dealer located in Waycross, Georgia. When the mobile home was delivered to the Wrights, it was not permanently secured. Instead, it was supported by a single jack which was attached to the tongue of the mobile home and which rested solely on a concrete block.

In preparing to move into the mobile home, Mr. Wright contacted Southern Bell and asked that three telephones be installed. On the morning of May 19, 1975, Southern Bell's employee, Vivian Cox, arrived at the Wright's home and was instructed by Mr. Wright where each phone was to be placed.

The Wrights requested that one of the phones be installed in an inner wall in the kitchen. In order to install this phone, Cox drilled a hole through the kitchen floor, inserted a wire into the hole, and went underneath the mobile home to pull it through. She was unable to pull the wire through, so she returned to the kitchen and repeated the procedure a second time, but was again unsuccessful in pulling the wire through.

At this point, Mr. Wright crawled un-derneath the home to assist Cox by attempting to pull the wire through the

hole while she pushed it through from the kitchen. While Mr. Wright was under the mobile home, the concrete block which was underneath the tongue and jack at the front of the home broke or cracked, and the mobile home fell upon him causing his death.

Ms. Wright brought an action, both on her behalf and as administratrix of her husband's estate, against Southern Bell in the District Court for the Southern District of Georgia, seeking to recover damages for the wrongful death of her husband and for medical and funeral expenses. After the first trial was declared a mistrial, the jury in the second trial returned a verdict in Ms. Wright's favor in the amount of $65,000.00. Southern Bell moved for judgment notwithstanding the verdict, or, in the alternative, for a new trial. This motion

was denied by the district court, and Southern Bell now appeals.

The thrust of Ms. Wright's case is relatively simple. She alleges that Cox, by virtue of her vast experience in installing telephones in mobile homes was fully aware of the dangers inherent in working under mobile homes that were only temporarily secured.1 Thus, because of Cox' superior knowledge in such matters, she owed a duty to the decedent to warn him of the dangers of going underneath his mobile home. By asking Mr. Wright to go under the home without warning him of the danger of doing so, Ms. Wright contends, Cox was negligent and her negligence proximately caused Mr. Wright's death.

Southern Bell advances several persuasive arguments to support its contention that it cannot, as a matter

of law, be liable for the death of Mr. Wright. We need look no further than the first one to conclude that Southern Bell cannot be liable in this case.2

As we have already illustrated by our synopsis of the plaintiff's case, she attempts to impose liability on Southern Bell under the doctrine of respondeat superior. A review of the complaint, pretrial order and evidence presented at trial shows that the only acts or omissions complained of are those of Cox. Under Georgia law, before a master may be held liable for the negligent acts of its servants, the servant must have been acting both within the scope of his employment and in the prosecution of the master's business. Selman v. Wallace, 45 Ga.App. 688, 165 S.E. 851 (1932).

Southern Bell is willing to concede

that Cox' request for assistance may have been in the prosecution of Southern Bell's business, but it vigorously denies that Cox acted within the scope of her employment in enlisting the aid of Mr. Wright.3 In Huddle House, Inc. v. Burke, 133 Ga.App. 643, 647, 211 S.E.2d 903, 907 (1974), the Georgia Court of Appeals held:

> No employee has power to employ another to assist him in his work without express authority; and if he does so, he is acting without the scope of his authority.

In Burke the employee had enlisted the help of a customer, a young boy, who was injured as he was removing ice from the storage area of an ice machine. The Georgia Court Of Appeals held, inter alia, that the employer could not be liable for the acts of its servants in enlisting the help of the customer since they acted outside the scope of their employment in doing so.

Southern Bell argues that a similar conclusion is especially appropriate in this case because Southern Bell's own regulations specifically forbid employees from requesting the assistance of customers in the performance of company work. In view of this controlling authority, we must agree with Southern Bell that it cannot be responsible for the negligent acts of Cox because she acted outside the scope of her employment in asking the decedent to assist her. See also Waller v. Southern Ice & Coal Co., 144 Ga. 695, 87 S.E. 888 (1916); Carter v. Bishop, 209 Ga. 919, 76 S.E. 2d 784 (1953).

The district court felt that this case is controlled by Higgins v. D & F Electric Co., 110 Ga.App. 790, 140 S.E. 2d 99 (1964). Higgins presented a different situation, both substantively and procedurally. In Higgins the

defendant was responsible for electrical wiring on the premises and knowingly permitted or directed another person who happened to be the owner, to come in direct contact with the electrical wiring. This would be similar to the case at bar if the telephone company employee had, knowing of the presence of Mr. Wright beneath the trailer, drilled or driven some object through the floor striking him. Further, when Higgins was decided, procedures for testing the legal sufficiency of a cause of action in Georgia were somewhat different from the procedures currently utilized. In Higgins, the legal sufficiency of the plaintiff's complaint was tested by the filing of a general demurrer. For the purpose of ruling on the demurrer, the facts alleged in the plaintiff's petition were accepted as true. Whether true or

not, the petition in Higgins alleged that, when the electrical contractor's employee caused Mr. Higgins to drill into the energized electrical line, he did so within the scope of the authority conferred upon him by the defendant. Thus, when the Court of Appeals ruled, it held only that a cause of action was stated; it did not question the correctness of the allegations. In the present case, Cox was acting outside the scope of her employment; this distinction renders any reliance on Higgins inappropriate.

The plaintiff points to the court's conclusion in Higgins that the homeowner was not a "volunteer" and argues that the decedent was likewise not a volunteer in the present case. We fail to see the relevance of this point. The decedent's status as a volunteer would become important if the plaintiff's theory of

recovery was that, at the time of the accident, her husband had been a servant of Southern Bell. Southern Railway Co. v. Benton, 57 Ga.App. 520, 523, 196 S.E. 256 (1938). But here, the plaintiff's theory of recovery is that Southern Bell is liable under the doctrine of respondeat superior for the negligence of its employee; Ms. Wright does not contend that Southern Bell breached a duty arising out of the master-servant relationship. Under the plaintiff's theory of the case, Southern Bell can only be liable for any negligence of Cox if she were acting within the scope of her employment and, as we have already seen, Cox was acting outisde the scope of her employment in enlisting the aid of Mr. Wright.

The result we reach is not at

odds with the established rule in Georgia that the fact that a servant disobeys the instructions of his master does not insulate the master from liability for the servant's negligence. See Porter v. Jack's Cookie Co., 106 Ga.App. 497, 127 S.E.2d 313 (1962); Evans v. Caldwell, 52 Ga.App. 475, 184 S.E. 440 (1936), aff'd, 184 Ga. 203, 190 S.E. 582 (1937). As the court in Porter specifically recognized, a violation of instructions may constitute a departure from the scope of employment. 106 Ga.App. at 501, 127 S.E.2d 313.

Because we conclude that Southern Bell cannot be liable for the negligence of Cox, we reverse the district court's decision to overrule Southern Bell's motion for judgment notwithstanding the verdict. Accordingly, judgment should be entered for Southern Bell.

REVERSED.

---

1. Ms. Wright relied heavily on the following regulation in Southern Bell's Service Manual to show an awareness by Southern Bell and its employees that working under such mobile homes could be dangerous:

> Wiring runs should be attached to the outer edge of the outrigger so that it will not be necessary to crawl under the mobile home.

Bell System Practices Station Service Manual Section 461-220-100, Paragraph 4.11.

2. Southern Bell contends that Cox' request for assistance could not, in any event, be the proximate cause of Mr. Wright's death. See Standard Oil Co. v. Harris, 120 Ga.App. 768, 172 S.E.2d 344 (1969). The cause of the accident, Southern Bell argues, was a dangerous condition in the premises-the faulty support to the tongue of the mobile home. It is well settled in Georgia that the owner or occupier of premises is responsible for defects in those premises. Ga.Code Ann. Section 105-401. Because neither Southern Bell nor its employee had assumed dominion or control over the premises, it is urged that Southern Bell cannot be held liable for injuries caused by a defect in the premises under the control of Mr. Wright. We are much

impressed by this argument, but need not decide the issue in view of our conclusion that Cox acted outside the scope of her employment.

3. At trial Cox denied asking for Mr. Wright's assistance. In view of the jury verdict in favor of the plaintiff, however, both parties agree that we must assume for the purposes of deciding this case that Cox did in fact request Mr. Wright's help.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2208

D. C. Docket No. CA-276-48

WANDA STARR WRIGHT, Individually and as Administratrix of the Estate of James Lewis Wright,

Plaintiff-Appellee,

versus

SOUTHERN BELL TELEPHONE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Georgia

Before SIMPSON, TJOFLAT and HILL, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered that the plaintiff-appellee pay to the defendant-appellant the costs on appeal, to be taxed by the Clerk of this Court.

October 22, 1979

ISSUED AS MANDATE:

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
600 Camp Street
NEW ORLEANS, LA. 70130
Office of the Clerk

TO ALL PARTIES LISTED BELOW:

NO. 77-2208 - Wanda Starr Wright, etc. -vs- Southern Bell Telephone Company

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By s/Claudia Nides
Deputy Clerk

cc: Messrs. William R. Waldrop
John M. Gayner, III
Mr. Grayson B. Lane
Mr. C. Robert Faucette

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
600 Camp Street
NEW ORLEANS, LA. 70130
Office of the Clerk

Mr. C. Robert Faucette
Attorney at Law
188 Alabama Street
Spartanburg, S.C. 29302

NO. 77-2208 - WANDA STARR WRIGHT, ETC.
v. SOUTHERN BELL
TELEPHONE COMPANY

MANDATE STAYED TO AND INCLUDING
February 20, 1980

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing

of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21 (1) of the Supreme Court, effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore, will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, CLERK

s/Mary Beth Breaux
Deputy Clerk

/bh

enc.
cc: Messrs. William R. Waldrop
John M. Gayner, III
Mr. Grayson B. Lane

Supreme Court, U. S.
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MAR 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1390

WANDA STARR WRIGHT, Individually and as Administratrix of the Estate of James Lewis Wright,
Plaintiff-Petitioner,

v.

SOUTHERN BELL TELEPHONE COMPANY,
Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT, SOUTHERN BELL TELEPHONE COMPANY, IN OPPOSITION TO THE PETITION OF WANDA STARR WRIGHT FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1390

WANDA STARR WRIGHT, Individually and as Administratrix of the Estate of James Lewis Wright,
Plaintiff-Petitioner,

v.

SOUTHERN BELL TELEPHONE COMPANY,
Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT, SOUTHERN BELL TELEPHONE COMPANY, IN OPPOSITION TO THE PETITION OF WANDA STARR WRIGHT FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Wanda Starr Wright, has filed her petition asking that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on October 22, 1979. Southern Bell Telephone Company as Defendant-Respondent files this its brief in opposition thereto.

I. OPINION OF COURT OF APPEALS

Southern Bell Telephone Company, Defendant-Respondent, (hereinafter "Respondent") agrees that the opinion of the United States Court of Appeals for the Fifth Circuit is reported at 605 F. 2d 156, and agrees that the copy appended to the petitioner's petition is a true and correct copy of said opinion.

II. JURISDICTION OF THE UNITED STATES SUPREME COURT

Respondent agrees that petitioner's proper remedy is to invoke this Court's jurisdiction pursuant to Title 28, United States Code, Section 1254(1), which provides for review of judgments of the United States Courts of Appeals. Respondent further agrees that petitioner's motions for panel rehearing and for rehearing *en banc* were denied as set forth in petitioner's petition. Respondent further agrees that pursuant to Rule 41, Federal Rules of Appellate Procedure, and Fifth Circuit Local Rule 10(e) (13) the issue of the mandate was stayed pending determination of the relief Petitioner has requested. Respondent further agrees that the exhibits attached to Petitioner's petition and brief (inclusive of the judgment of the United States Court of Appeals for the Fifth Circuit, the notification of the order denying the petition for rehearing and for rehearing *en banc* and the stay of mandate) are true and correct copies. However, respondent denies that petitioner is entitled to a writ of certiorari as she prayed for.

III. THE QUESTION PRESENTED FOR REVIEW

Respondent urges that the only grounds for consideration of review on certiorari under the rules of the

United States Supreme Court (Rule 19) is that portion of said rule which provides as follows:

> "or has decided an important state or territorial question in a way in conflict with applicable state or territorial law;"

Respondent denies that the United States Court of Appeals for the Fifth Circuit has so acted, but agrees that it is the only grounds upon which petitioner may proceed in her petition for the grant of a writ of certiorari. Respondent denies that said opinion of the United States Court of Appeals for the Fifth Circuit decided a question of Georgia law in conflict with the applicable state law.

Respondent further disagrees with Petitioner's assertion that the law of Georgia was "abrogated" by the Court of Appeals in holding that Southern Bell was not liable for the Death of Wanda Starr Wright's husband, even assuming that Mr. Wright went under the mobile home to assist one of Respondent's employees at the request of such employee.

Respondent takes exception to the statement of Petitioner in paragraph III of her petition to the effect that Respondent's employee "directed" Mr. Wright to go under the structure. Petitioner further takes exception to the implication that Mr. Wright had no knowledge of the danger of crawling under the mobile home. The evidence in the record is clear to the effect that he had superior knowledge of such danger to Respondent's employee. (See Appendix to this Brief, page 1a and 2a.

Finally, Respondent's position is that said decision, judgment and opinion of the United States Court of Appeals for the Fifth Circuit is consistent with and entirely in accordance with the established law of the State of Georgia regarding all questions raised or decided therein.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent agrees with petitioner's statement that there are none.

V. STATEMENT OF THE CASE

Respondent agrees with petitioner's statement of the case with the following exceptions:

(a) Petitioner says that the mobile home was not permanently underpinned. In fact, as recited in said opinion of the United States Court of Appeals for the Fifth Circuit:

> "When the mobile home was delivered to the Wrights it was not permanently secured. Instead it was supported by a single jack which was attached to the tongue of the mobile home and which rested solely on a concrete block."

Furthermore, in footnote 2 of its said opinion the United States Court of Appeals for the Fifth Circuit said:

> "The cause of the accident, Southern Bell argues, was a dangerous condition in the premises—the faulty support to the tongue of the mobile home. It is well settled in Georgia that the owner or occupier of premises is responsible for defects in those premises (Ga. Code Ann. §105-401). Because neither Southern Bell nor its employee had assumed dominion or control over the premises, it is urged that Southern Bell cannot be held liable for injuries caused by a defect in the premises under the control of Mr. Wright. We are much impressed by this argument, but need not decide the issue in view of our conclusion that Cox acted outside the scope of her employment,"

Respondent agrees with that portion of Petitioner's statement of the case wherein she says:

> "Southern Bell's policy is that no service person is to solicit assistance from customers."

In fact, Southern Bell had a specific rule directed to its own employees that in no event were they ever to seek the assistance of a customer or anyone in a customer's home, and that in the event they had troubles they were to call a Southern Bell dispatcher. (Appendix to this Brief, page 2a, 3a, and 4a.

Of course, Respondent disagrees with Petitioner's assertion that Mr. Wright was acting on the basis of a specific request from Mrs. Cox when he crawled under the trailer, but as noted in said opinion of the United States Court of Appeals for the Fifth Circuit, the jury verdict in plaintiff's favor requires that it be conceded that the jury must have found that there was such a request in order to reach its verdict.

Respondent also takes exception with that portion of Petitioner's statement of the case wherein she asserts:

> "This method of installation was contrary to the Southern Bell service manual which required that mobile home installations be done in such a way that crawling under the home would not be necessary."

The specific Southern Bell rule regarding wiring runs under mobile homes is set out on page 150 of the Appendix which is a part of the record in the Court below. (Appendix to this Brief, page 5a and 6a.) What it says is:

> "Wiring runs *should* be attached to the outer edge of the outrigger so that it will not be necessary to crawl under the mobile home." (Emphasis supplied.)

The point is that Southern Bell did not have a rule which directed its employees not to crawl under mobile

homes, but it encouraged them to make the wiring runs in such a way that it would not be *necessary* to crawl under the mobile home. There was no Southern Bell rule which absolutely prevented its employees from crawling under a mobile home if that became necessary as indeed it did in this case. In fact, the reason that crawling under the mobile home became necessary was because of the specific place where Mrs. Wright wanted one of the telephones installed. In fact, the record shows that Mrs. Wright directed Respondent's employee where to drill the holes in the floor. (Appendix to this Brief, page 7a.) The record shows that Mrs. Wright wanted a telephone in the kitchen hung up on a particular wall and in order to have it there the holes had to be drilled where Mrs. Wright directed Respondent's employee to drill them. (Appendix to this Brief, page 7a.) Thus, the necessity of crawling under the mobile home was brought about by a specific request of Southern Bell's customer and in crawling under the mobile home herself Mrs. Cox did not violate any of Respondent's rules.

Respondent also disagrees with Petitioner's statement to the effect that:

> "Jay was not familiar with the danger associated with his actions as was Cox who had installed telephones in mobile homes on prior occasions." (Petitioner's Brief, page 4).

Reference has already been made to the fact that the mobile home was temporarily secured as described in the opinion of the United States Court of Appeals for the Fifth Circuit previously quoted. The record shows that the trailer was brought to the Wright's trailer lot on a Friday and that it was on Monday when the accident occurred which resulted in Mr. Wright's death. (Appendix to this Brief, page 7a and 8a.) Thus, again, Respondent's position is that it is clear from the record that Mr. Wright

had superior knowledge regarding the dangers of crawling under the mobile home and the possibility of its falling as it did.

VI. ARGUMENT IN OPPOSITION TO GRANTING WRIT

In paragraph VI of her brief, Petitioner argues that:

> "Georgia agency and tort law was completely ignored in the opinion of the court of appeals." (sic) (Petitioner's Petition, page 6).

A reading of the opinion by the United States Court of Appeals for the Fifth Circuit is all that is necessary to demonstrate that such is not the case. Judge James Hill, who wrote the opinion, concurred in by Judges Simpson and Tjoflat, was a distinguished United States District Court judge in the State of Georgia prior to his elevation to the United States Court of Appeals for the Fifth Circuit. Prior to his becoming a District Court judge, Mr. Hill was an imminently successful Georgia trail practitioner. The opinion itself evidences Judge Hill's familiarity with the legal questions before the Court and his careful consideration of numerous Georgia cases touching on this question. It is manifestly incorrect to assert that Georgia agency and tort law were ignored in the opinion written by Judge Hill.

However, the major thrust of Petitioner's brief and petition is that the instant case is controlled by the case of *Higgins* v. *D & F Electric Company,* 110 Ga. App. 790, 140 S.E. 2d 99 (1964). This has been the petitioner's position throughout this case from the trial through her petition for issuance of a writ of certiorari. In the opinion of the United States Court of Appeals for the Fifth Circuit, Judge Hill very carefully and very definitively distinguished the *Higgins* case from the facts now before this Court. Judge Hill pointed out that in *Higgins* v. *D & G*

Electric Company, supra, the question was decided by the Georgia Appellate Court on a demurrur to the plaintiff's complaint. Judge Hill made it clear that under Georgia procedure in effect at that time, on a demurrur, the Georgia Appellate Court was required to assume that the facts alleged in the complaint were true. Judge Hill's point was that in the *Higgins* complaint there was a specific allegation that the defendant's employee there was acting within the scope of the authority conferred upon him by his employer. Thus, in *Higgins* the Georgia Appellate Court had to assume that the plaintiff's allegation that the defendant's employee was within the scope of his employment when he directed another person to assist him was true. In addition to this "procedural" distinction, Judge Hill went on to point out that in *Higgins* the question of whether or not the decedent's status as a volunteer was without relevance in the instant case. Judge Hill pointed out that the question of being a volunteer would be important if plaintiff's theory of recovery was that at the time of his death the plaintiff's husband had been a servant of Respondent. Judge Hill went on to point out that in the case at bar plaintiff was relying on the doctrine of respondeat superior.

Most persuasively, however, in Judge Hill's opinion was his citation of and reliance on the case of *Huddle House, Inc.* v. *Burke,* 133 Ga. App. 643, 647, 211 S.E. 2d 903, 907 (1974). Judge Hill quoted from that case as follows:

> "No employee has power to employ another to assist him in his work without express authority; and if he does so, he is acting without the scope of his authority."
> (Appendix to Petitioner's Petition, p. 3).

Nothing could be clearer than that the United States Court of Appeals for the Fifth Circuit has not decided this

case in conflict with applicable Georgia law, but rather has carefully considered the Georgia statutes and cases applicable and arrived at a result which is in accordance with the law of Georgia.

The *Huddle House* case is only one example. A number of Georgia cases were cited toward the end of the opinion (Appendix to Petitioner's Petition, page 4) regarding the result when a servant disobeys instructions from his master. The opinion of the United States Court of Appeals for the Fifth Circuit specifically recognizes that such departures do not necessarily insulate a master from liability for the servant's negligence.

However, petitioner goes on to argue that the United States Court of Appeals for the Fifth Circuit opinion either did not deal with or incorrectly applied the Georgia law as to *apparent* authority. While this subject matter might be a proper topic for extensive argument and citation of authority were this Court to grant a writ of certiorari, it is sufficient to note here only that there simply was no evidence in the record at trial nor before the Court below from which a conclusion or inference could be drawn that Mrs. Cox had the apparent authority to ask the decedent to assist her. The only evidence on this matter is that previously referred to wherein Mrs. Wright testified that Mrs. Cox asked her husband to crawl under the house. No other facts showing any apparent authority on the part of Mrs. Cox to ask for the assistance of other persons appears in the record. In fact, as noted in *Huddle House, Inc.* v. *Burke,* supra, the Georgia rule is that it requires *express* authority for an employee to have the power to employ another to assist him. It is the nature of the beast in business operations that the power to hire and fire and to obtain temporary or permanent assistance is a managerial function. Thus, the rationale of the law when it comes to matters dealing with *apparent* authority to ob-

tain the assistance of another in an employment-like capacity is that the person holding himself out as authorized to do the "hiring" must appear by circumstances or other evidence to be clothed with that authority. The record in this case is devoid of any such evidence or circumstances. Mrs. Cox was an installation employee and clearly one not clothed with managerial-type discretion or authority.

The rule on apparent authority in Georgia is as stated at 3 Am. Jur. 2d §75, at 477-78 (1962):

> "In order to establish that an agent had the apparent authority to do the act in question, it must be established (l) that the principal has manifested his consent to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority; (2) that the third person knew of the facts and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and (3) that the third person relying on such appearance of authority has changed his position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal. Manifestly, a party dealing with an agent must prove that the facts giving color to the agency were known to him when he dealt with the agent, and that he believed the agent ws acting within his authority; if he has no knowledge of such facts, he does not act in reliance upon them and is in no position to claim anything on account of them." *(See also Buffalo Insurance Co.* v. *Star Photo Finishing Co.* 120 Ga. App. 697, 705, 172 S.E. 2d 159 (1969); *National Homes, Inc.* v. *City Plumbing & Heating Supply Company,* 108 Ga. App. 519, 133 S.E. 2d 416 (1963); *Piedmont Operating Co.* v. *Cummings,* 40 Ga. App. 397, 149 S.E.814 (1929).

Respondent believes that the opinion of the United States Court of Appeals for the Fifth Circuit of itself suffi-

ciently deals with and disposes with the other arguments and citations of Georgia authority in the petition for a writ of certiorari.

Finally, Respondent would call the Court's attention to that portion of the opinion below wherein Judge Hill made reference to Respondent's "persuasive argument" that the proximate cause issue could be decisive had the case not been decided on the basis of Mrs. Cox's lack of authority. As previously noted, footnote 2 of the opinion calls attention to the case of *Standard Oil Company* v. *Harris,* 120 Ga. 768, 172 S.E. 2d 344 (1969) for the proposition that the real and proximate cause of the death of Mr. Wright was a defect in the premises under Mr. Wright's own control. Respondent cites *Standard Oil Company* v. *Harris,* supra, and the reasoning of the Court below in connection with this point is an additional reason for the denial of a writ of certiorari in the case now before this Court.(See Appendix to Petitioner's Petition, pages 2 & 3).

VII. CONCLUSION

(a) The United States Court of Appeals for the Fifth Circuit correctly decided this case and correctly analyzed and applied the law of Georgia and did so in such a way that there is no conflict with any applicable law of the State of Georgia.

(b) The United States Court of Appeals for the Fifth Circuit correctly applied the law of Georgia with respect to the question of the lack of authority on the part of Mrs. Cox to ask for the assistance of the decedent.

(c) The United States Court of Appeals for the Fifth Circuit correctly determined that there was no evidence of apparent authority on the basis of which a verdict in the Petitioner's favor could be upheld.

WHEREFORE, Respondent respectfully requests this Honorable Court deny the Petitioner's application and petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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February 29,1980.

APPENDIX

EXCERPTS FROM APPENDIX OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Q. Did you see what she was doing?

A. She was drilling a hole in the floor.

Q. What happened after that? What did she do?

A. She drilled a hole in the floor and she put the wire in, and she got up and she went outside.

Q. All right. Let me ask you this. Where was Jay?

A. Jay was leaning up against the counter right at the sink?

Q. In the kitchen?

A. Yes, in the kitchen. He was standing there talking to me. The icebox opened up to the white, and I had it open and I was standing there. We were kind of facing each other while I was washing the icebox.

Q. And she went outside?

A. Yes, sir. She went outside.

Q. Did she come back in the trailer?

A. Yes, sir. She came back in the trailer. And she said she coldn't get the wire through, and she asked Jay if he would mind pushing the wire through and let her go back out there and she would get it.

Q. Did Jay help her do that?

A. Yes.

Q. All right. What happened on the second trip out?

A. She came back in. She said she still couldn't get it and to tap on the floor, he said okay - and she went back

A. (Cont'd) outside. He tapped on the floor - and she came back in. . .

Q. What was he tapping on the floor with, Starr?

A. His knife.

Q. Was that the knife he borrowed from Mr. Bradham?

A. Yes,sir.

Q. Okay. Was she able to find it?

A. No, Sir. She said she could hear him tapping, but she still couldn't find the wire.

Q. Then what happened?

A. She asked him if he would mind going outside and let her push the wire through and see if he could find it.

Q. Did he agree to do that?

A. Yes, sir. He went outside. She walked out with him. She came back in and she pushed the wire down. She started back out the door. Then she turned around and she looked at me and she said, "Would you watch the wire in the box and if it starts tangling, would you straighten it out?" I said, "Okay." She walked out the door and she came back in. Just as she started to stoop down, it—it fell.

Q. Did you go outside?

A. Yes,sir. We both ran out the door.

Q. Okay. And I believe Mrs. Cox called the operator and got the ambulance there?

A. Yes, sir.

* * *

Q. (Cont'd) trial, is that correct?

A. Yes,sir.

Q. You heard him testify that the rules at Southern Bell, the rules that applied to installing telephones, did not change after May 19th, 1975, with respect to mobile homes?

A. That is correct.

Q. And you agree with that?

A. That is correct.

Q. So you-all were using the same rules before this happened as you used after it happened?

A. Yes.

Q. I believe one of the rules that you-all have at Southern Bell in installing telephones is that when an installer is putting phones in and comes to a problem that you cannot handle, that you call the dispatcher and ask for assistance?

A. That's correct.

Q. That is a company rule? And I believe you testified prior to this trial, Mrs. Cox, that you were familiar with mobile homes, that you install phones in them,and you've told us here today around fifty percent of your time is spent with mobile homes?

A. That's correct.

Q. So you are familiar with them. And you understand what it means when a trailer is blocked up and not blocked up?

* * *

Q. (Cont'd) tongue was resting on the block?

A. Yes, sir. This was underneath the. . .

Q. All right. Take your seat. I believe you told me before, Mrs. Cox, that this rule about seeking assistance was taught to you in the beginning of your training, that if you needed help, you would call the dispatcher and ask for Mr. Ransom or one of your supervisors to come help you?

A. This is correct, yes.

Q. If you can't do it yourself, you get somebody from the Bell Telephone Company to come help you?

A. Yes, sir.

Q. Now, May 19th, Mrs. Cox, what time did you get to the New Hope Trailer Park?

A. Somewhere around eleven a.m.

Q. All right. Had you been to this particular place before, this trailer park?

A. Yes, sir.

Q. You had been there to install other telephones?

A. Yes, I installed the one she had before.

Q. In her old trailer?

A. Yes, sir.

Q. Was that the same type installation?

A. No. In this trailer she had—her new trailer had never been wired for phones before.

Q. The old trailer had been wired?

* * *

Q. That's been the Bell Telephone creed, I guess, since the company was founded?

A. Since I've been employed by. . .

Q. Your seventeen years?

A. Yes, sir.

Q. Mr. Ransom, with respect to this rule—you-all have a rule, as I understand it, according to Mrs. Cox, that when a person cannot do the job himself, a Bell Telephone employee cannot do the job, the company policy or rule is to call and ask for assistance from Bell Telephone, is that a correct statement?

A. Yes, sir. That's basically true.

Q. And that rule means you do not ask for assistance from customers, is that true?

A. That's True.

Q. And you just read the creed tht says no job is so important that it cannot be done with enough time involved, and I believe she had two hours to do this job?

A. She had as much time as was necessary to do the job.

Q. She wasn't really limited to two hours then?

A. No, sir.

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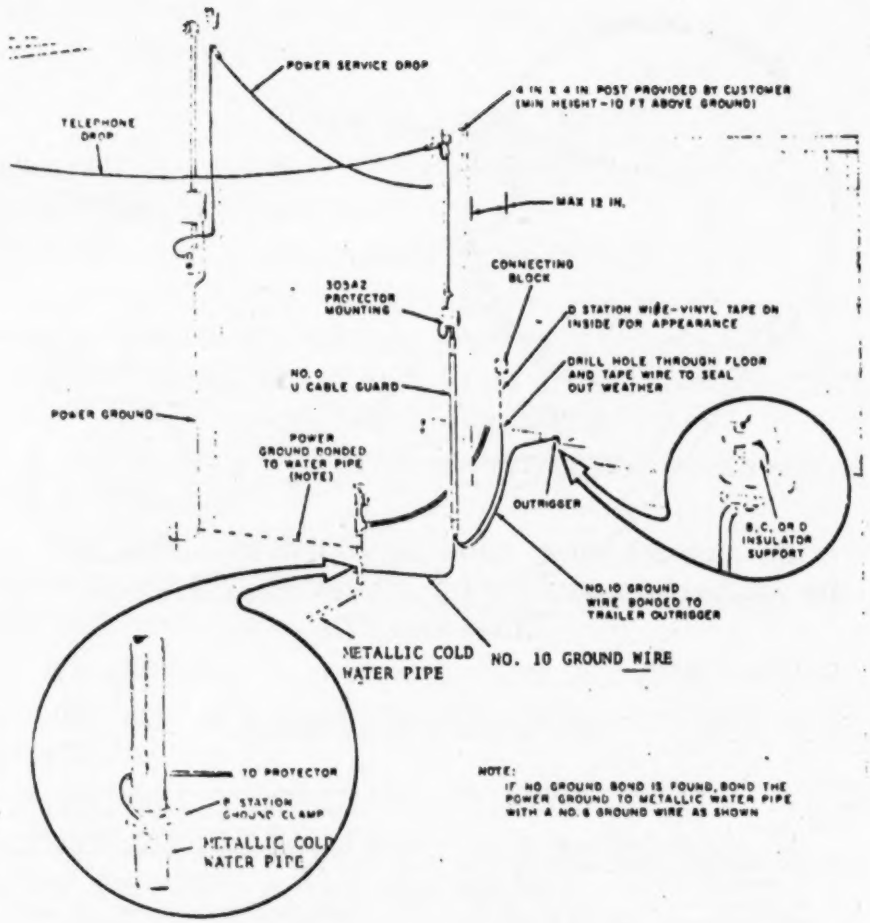
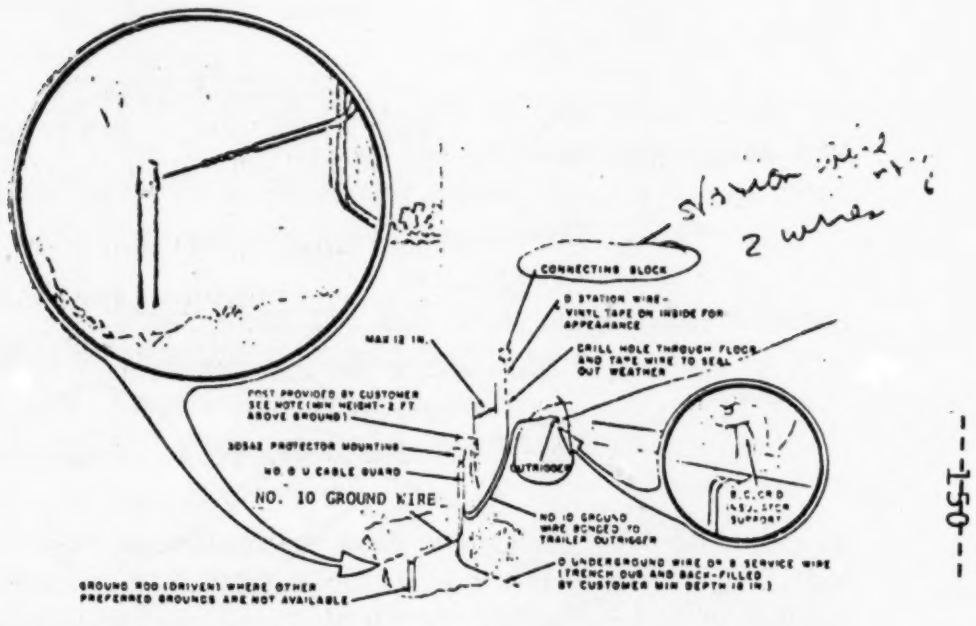


Fig. 6—Aerial Service Protector Grounded to Water Pipe

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NOTE
4 IN X 4 IN WOOD POST OR A COMMERCIALLY AVAILABLE METAL POST THAT PROVIDES MOUNTING FACILITIES FOR PROTECTOR, WIRE AND U CABLE GUARD

Fig. 5—Buried Service Protector Grounded to Ground Rod

and the same wiring methods used for single family dwellings, built on site, can be used for mobile homes.

4.10 The heating, plumbing, sewer, and water pipes run down the center. Electrical wiring is in the outside walls of the mobile home (see Fig. 8), approximately 16-inches above the finished floor level or in the ceiling, leaving the floor area along the outside walls free for drilling for station wire entry. Drill straight down through plywood floor avoiding outriggers. Use care when drilling the soft insulating board covering the bottom of the mobile home as it tears easily. Seal holes around station wire to prevent entrance of air and moisture. If it should be necessary to install a telephone on an interior wall of the mobile home, use extreme caution in penetrating floor to avoid damage to other equipment.

4.11 Wiring runs should be attached to the outer edge of the outrigger so that it will not be necessary to crawl under the mobile home. Fasten B insulator supports equipped with K bridle rings (or equivalent) to outer edge of outriggers. Attach wire to mobile home by running through bridle ring, folding back and taping, or clamping to insulator support with a B ground wire clamp or

Q. Mr. Ransom, I assume you know the difference in mobile homes when they are set up permanently or when they are temporarily set up?

A. I would say so.

* * *

Q. You did not tell the police officers at that time, Mrs. Wright, that Mrs. Cox had asked your husband to go under the trailer, did you?

A. I don't really remember what I told them.

Q. In fact, Mrs. Wright, as you previously testified, you have never told anyone other than your lawyers that Mrs. Cox asked Mr. Wright to go under the house, isn't that right?

A. We were told—I've never discussed it with any of the neighbors.

Q. Mrs. Cox drilled the holes in the floor, as shown by these red dots on this diagram, where you and Jay asked her to drill them, isn't that right?

A. Yes, sir.

Q. You-all wanted this phone in the kitchen hung up on this wall here?

A. Yes, sir.

Q. And you asked her to drill the hole in the floor where she drilled it, isn't that right?

A. Yes, sir.

Q. Now, as I understand it, Mrs. Wright, you were there when they brought the trailer on this Friday before the accident happened, right?

A. Yes, sir.

Q. And I'm sorry, I just couldn't hear a part of your testimony—you said they brought the trailer, if I understood

Q. (Cont'd) you. Were there two people or one?

A. It was one man.

Q. Just this guy named Doug. . .

A. Doug.

Q. . . .apparently that Mrs. Cribbs, Q.T., was talking about?

A. Yes, sir.

Q. And you were they when they brought it, I take it, you saw him put it up on the block, right?

A. I wasn't watching him. I saw it sitting on the block, but I didn't—I was talking to Q.T. about the trailer.

Q. In any event, if I understood your testimony, it was. . .

A. Yes, it was sitting. . .

Q. . . .sitting up on the. . .

A. . . .on the block.

Q. You saw it sitting up on the block?

A. Yes.

Q. And Mr. Wright knew it was sitting up on the block like it was, didn't he?

A. Yes.

Q. You-all went out—you and he looked at it together, didn't you?

A. We didn't go around the front and examine it.